Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

RICHARD A. GRECO,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of Washington

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the double jeopardy clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, bars the trial court from resolving factual issues going to the elements of the offense when the defendant's convictions were vacated because the trial court's initial findings of fact were deemed insufficient?

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Petitioner was convicted of nine counts of bribery after a bench trial on January 14, 1988 when the court entered its findings of fact and conclusions of law as required by Washington court rules. (Appendix "C"). The Washington State Court of Appeals vacated the bribery convictions on March 14, 1990, reasoning that the findings were inadequate to support conclusions of guilt because they failed to address all the elements of the crime. *See State v. Greco,* 57 Wn.App. 196, 787 P.2d 940, *review denied,* 114 Wn.2d 1027 (1990). (Appendix "D"). Petitioner sought review in the Washington Supreme Court as to the double jeopardy question, which review was denied. (Appendix "E"). The trial court then entered into a new fact finding proceeding submitting additional findings of fact to address factual issues

going to the elements of the offenses charged. (Appendix "F"). Petitioner again appealed arguing, amongst other issues, that the procedure violated double jeopardy. The Court of Appeals in an unpublished decision affirmed the convictions on September 21, 1993, (Appendix "B"), and denied his motion for reconsideration on October 20, 1993 (Appendix "G"). Petitioner then petitioned for review to the Washington Supreme Court which petition was denied on April 6, 1994. (Appendix "A"). Petitioner now moves for certiorari to the United States Supreme Court.

JURISDICTION

By order dated April 6, 1994, the Washington State Supreme Court denied petitioner's petition for review. The Supreme Court has jurisdiction to hear the appeal of this case pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. U.S. CONST. Amend. V which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

B. U.S. CONST. Amend. XIV, § 1 which provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The charges in this case involve the establishment of licensing subagencies throughout Pierce County. CP 31. They resulted from transactions between defendant and Marion Carter, Howard Forbes, David McCallum, Mead McDonald, Robert Bright, Rex Nichols and Walt Robb, the owners of the particular licensing subagencies. Petitioner, the Pierce County Auditor, was alleged to have accepted money from these individuals in exchange for continuing their particular licenses to operate. CP 32. After a bench trial, the court found petitioner guilty of nine counts of bribery in violation of RCW 9A.68.010 (1)(b)[1], along with one misdemeanor count of official misconduct.[2]

REASONS FOR GRANTING PETITION

After the case was remanded to the trial court for the entry of further findings, the Washington Court of Appeals determined that this procedure did not violate the

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[1] RCW 9A.68.010(1)(b) provides as follows:

9A.68.010. Bribery

(1) A person is guilty of bribery if:

. . .

(b) Being a public servant, he requests, accepts, or agrees to accept any pecuniary benefit pursuant to an agreement or understanding that his vote, opinion, judgment, exercise of discretion, or other action as a public servant will be used to secure or attempt to secure a particular result in a particular matter.

[2] The misdemeanor conviction was upheld on the initial appeal and is not part of this petition.

double jeopardy clause. *See* Appendix "B", at 14-17. The Washington State Supreme Court again denied review on April 6, 1994.

ARGUMENT

The double jeopardy clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy." *Lockhart v. Nelson*, 488 U.S. 33, 38, 109 S.Ct. 285, 289, 102 L.Ed.2d 265 (1988). Jeopardy attaches once a defendant is "put to trial before the trier of facts, whether the trier be a jury or a judge." *Serfass v. United States*, 420 U.S. 377, 388, 95 S.Ct. 1055, 1062, 43 L.Ed.2d 265 (1975). In a trial to the judge, which is the case here, jeopardy attaches once the court begins to hear evidence. 420 U.S. at 388, 95 S.Ct. at 1062.

The underlying policy behind the prohibition of being twice placed in jeopardy is that the state should not be allowed to subject an individual to embarassment, expense, ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The issue presented here is similar to the situation addressed by this Court in *Arizona v. Ramsey*, 467 U.S. 203, 104 S.Ct. 2305, 81 L.Ed.2d 164 (1984). Although addressing a capital sentencing proceeding, *Ramsey* involved the appeal of an acquittal from a bench trial where a set of findings, all favorable to the respondent, were entered by the trial judge. 467 U.S. at 212, 104 S.Ct. at 2310. There, the Arizona court entered findings of fact as required by state law, which legally entitled the defendant to a life sentence, rather than the death penalty. *Id.* at 211. In holding that the double jeopardy clause prohibited the entry of a second finding of fact, the Court reasoned:

> Reliance on an error of law, however, does not change the double jeopardy effects of a judgment that amounts to an acquittal on the merits. "[T]he fact that 'the acquittal may result from erroneous interpretation of governing legal principles' . . . affects the accuracy of that determination, but it does not alter its essential character."

Id. (citing *United States v. Scott*, 437 U.S. 82, 98, 98 S.Ct. 2187, 2197, 57 L.Ed.2d 65 (1978).

Further, in *Smalis v. Pennsylvania*, 476 U.S. 140, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986), the Court again found that the double jeopardy clause prevented a post acquittal appeal if reversal would result in further proceedings devoted to the resolution of factual issues going to the elements of the offense charged.

In *Smalis*, defendant demurred at the end of the state's case, which under Pennsylvania law, is a recognition that the state on a matter of law, produced insufficient evidence to establish his factual guilt. 476 U.S. at 144, 106 S.Ct. at 1748. After noting that neither the trial court's, nor Pennsylvania's Supreme Court's, characterization of an order granting a demurer was not controlling as a matter of double jeopardy law, *Id.* 476 U.S. at 144, 106 S.Ct. at 1748, n.5, the Court again held that the double jeopardy clause bars a remand where it would translate into proceedings devoted to the resolution of factual issues going to the elements of the offense charged. *Id.* 476 U.S. at 146, 106 S.Ct. at 1749.

In Washington the court rules require that the trial court make formal findings of fact and conclusions of law as to each element of the crime charged when a jury has been waived. *See State v. Komok*, 54 Wn.App. 110, 116, 772 P.2d 539 (1989); Washington CrR 6.1(d).[3]

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[3] CrR 6.1(d) provides:

> (d) Trial Without Jury. In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In

While Washington courts imply a finding against the party with the burden of proof in a civil matter, *see Life Insurance Co. v. Turnball*, 51 Wn.App. 692, 702, 754 P.2d 1262 (1988); *Manufacturer's Acceptance v. Erving Gelb*, 17 Wn.App. 886, 893, 565 P.2d 1235 (1977), the courts have apparently decided that a lesser standard should be applied in criminal cases. Indeed, Washington State's highest court has even gone so far as to allow the trial court to consider additional evidence on remand. *See State v. Wilks*, 70 Wn.2d 626, 424 P.2d 663 (1967).

The issue presented here is similar to the issue presented in *Arizona v. Ramsey, supra*, and *Smalis v. Pennsylvania, supra*. The remand was designed to allow for additional proceedings devoted to the resolution of factual issues going to the elements of the offense. The findings initially entered here were determined by the Washington Court of Appeals to be insufficient to support all of the elements of the charged offenses, a decision that the state did not appeal. *See State v. Greco*, 57 Wn.App. 196, 787 P.2d 942 (1990). The Washington State Court of Appeals vacated the judgment and remanded "for entry of further findings of fact and conclusions of law. . . ." 57 Wn.App. at 207, 787 P.2d at 946.

As such, under Washington law, petitioner was legally entitled to a verdict of not guilty and the remand for additional findings in order to support or direct a guilty verdict violates the double jeopardy clause. The Washington State Supreme Court twice refused to address whether the double jeopardy clause prohibited the entry of additional findings at a subsequent hearing, apparently adopting the Washington Court of Appeals' opinion that the Fifth Amendment does not prohibit this procedure. Since the procedure violated the double jeopardy clause

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giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

and the cases interpreting it, the Court should accept this petition for certiorari.

CONCLUSION

Based on the arguments, records and files contained herein, this petition for writ of certiorari should be granted, and this matter set for further briefing and argument.

Respectfully submitted,

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July 1, 1994

APPENDICES

APPENDIX A

THE SUPREME COURT OF WASHINGTON

No. 61092-4

STATE OF WASHINGTON,
Respondent,

v.

RICHARD GRECO,
Petitioner.

C/A No. 12015-1-II

(14719-0-II consol. w/12015-1-II)

ORDER

This matter came before Department II of the Court on its April 6, 1994, Motion Calendar on Petition for Review. Justice Johnson recused and Justice Durham sat as Justice Pro Tem on Department II. Department II having considered the Petition and the files herein, and the five members of the Department having unanimously agreed;

Now, therefore, it is hereby

ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 6th day of April, 1994.

/s/ James A. Andersen
Chief Justice

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

No. 12015-1-II
No. 14719-0-II

Division Two

THE STATE OF WASHINGTON,
Respondent,

v.

RICHARD GRECO,
Appellant.

Filed: September 21, 1993

MORGAN, J.—After a special inquiry, the State charged Richard Greco, former Pierce County Auditor, with 16 counts of bribery, RCW 9A.68.010, one count of official misconduct, RCW 42.20.101(3), and one count of requesting unlawful compensation, RCW 9A.68.020 (1). After a lengthy bench trial, Greco was convicted of nine of the bribery counts and the official misconduct count.

Greco appealed. In a previous opinion, *State v. Greco,* 57 Wn. App. 196, 205, 787 P.2d 935, *review denied,* 114 Wn.2d 1027 (1990), we rejected most of his claims and affirmed the official misconduct conviction. However, we also held that the trial court's findings of fact were inadequate to permit review of the nine bribery convictions. We reasoned:

> We cannot be sure the trial court found all the necessary elements. An agreement by Greco to exercise his discretion in return for cash payments may be inferred from the findings of fact, but it is not clear that the Judge actually concluded that there was such an agreement. The findings also fail to address the element of corrupt intent.[1]
>
> . . .
>
> Because the trial court's findings are inadequate, Greco's challenge to the sufficiency of the evidence to support a conviction on the bribery counts must abide the entry of new findings.

State v. Greco, 57 Wn. App. at 205. We vacated the judgment and sentence on the bribery counts and "remanded for entry of further findings of fact and conclusions of law, after the filing of which with this court, their sufficiency and the sufficiency of the evidence, will be addressed." 57 Wn. App. at 207.

After our opinion was filed, Greco sought review by the Washington Supreme Court. Review was denied. The case was mandated to the trial court on June 22, 1990. On September 13, 1990, the State contacted the defense to schedule a hearing for entry of supplemental findings of fact. The hearing was scheduled for December 20, 1990.

Due to unforeseen weather problems, the hearing was not held until January 25, 1991. On that date, Greco moved to dismiss the case based upon alleged violations

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[1] A footnote in our opinion noted:

> "It is apparent from the trial Judge's memorandum opinion that, in light of *State v. O'Neill*, 103 Wn.2d 853, 700 P.2d 711 (1985), he believed the necessary element of corrupt intent could be supplied by implication. The memorandum opinion, however, cannot fill the void in findings of fact in criminal cases where the ommissions consist of the basic elements of the crime."

of his right to speedy trial and his right against double jeopardy. The trial court denied the motion.

The trial court then entered supplemental findings of fact. Each finding was based on evidence taken at the original trial, and none was based on new evidence taken after remand. Indeed, no new evidence was taken after remand.

In its supplemental findings, the trial court found that "Greco acted with a corrupt intent in reaching the agreements or understandings therein, in that he used his position and authority as Pierce County Auditor to unlawfully and wrongfully obtain financial benefits for himself." [2] The trial court confirmed its guilty verdicts on the nine bribery convictions.

The State then requested recall of the mandate. Greco separately appealed the denial of his motion to dismiss.[3] The issues to be decided are (1) whether the nine bribery convictions are supported by sufficient evidence and (2) the effects of this court's prior remand for entry of supplemental findings.

Sufficiency Of The Evidence

Gerco's main argument is that the original and supplemental findings of fact are based on insufficient evidence. In a criminal case, evidence is sufficient if, when viewed in the light most favorable to the prosecution, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 99 S. Ct. 2781 (1979); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); *State v. Handburgh*, 119 Wn.2d 284, 293, 830 P.2d 641 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences

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[2] CP (5/15/91) 25-34, 33 (FF 18).

[3] The two appeals have now been consolidated.

that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201.

Greco was charged under RCW 9A.68.010. It provides in part:

> (1) A person is guilty of bribery if:
>
> . . .
>
> (b) Being a public servant, he requests, accepts, or agrees to accept any pecuniary benefit pursuant to an agreement or understanding that his vote, opinion, judgment, exercise of discretion, or other action as a public servant will be used to secure or attempt to secure a particular result in a particular matter.

Cases construing this statute require the State to prove "the elements of corrupt intent and an agreement to accomplish a particular result." *State v. Liewer*, 65 Wn. App. 641, 646, 829 P.2d 236 (1992); *Greco*, 57 Wn. App. at 202-203; *see State v. O'Neill*, 103 Wn.2d 853, 858, 700 P.2d 711 (1985) (construing RCW 9A.68.010 (1)(a)). The element of "corrupt intent" is implied because "in enacting the statute the Legislature did not intend to proscribe any innocent or constitutionally protected activity . . . ." *State v. O'Neill*, 103 Wn.2d at 859; *see also State v. Ferguson*, 302 S.C. 269, 395 S.E. 2d 182 (S.C. 1990) (corrupt means dishonest). Like any fact, corrupt intent may be shown by inference drawn from all the facts and circumstances. *State v. Whetstone*, 30 Wn.2d 301, 338, 191 P.2d 818, *cert. denied*, 335 U.S. 858 (1948).

Greco was convicted of nine counts of bribery involving five individuals. Counts 3 (1983-84) and 4 (1985) involved Walter Robb. Counts 8 (1982), 9 (1983), and 11 (1985) involved Howard Forbes and Dena and Davis McCallum (the Forbes/McCallum agency). Counts 13 (1981), 14 (1982), 15 (1984), and 16 (1985) involved Mead McDonald. Robb, Forbes, the McCallums and McDonald all operated licensing subagencies, and Greco,

in his role as Pierce County Auditor, had the authority to close them down, put them on probation, or otherwise affect their operations.

At trial, the evidence began with events in 1981 and 1982.[4] As early as 1981, Dolly Smith, one of Robb's employees, overheard a conversation in which Greco told Robb, "Just remember me at Christmastime." In both 1981 and 1982, Robb and Greco had conversations in which Greco expressed his intent to close down a competing licensing subagency, owned by Marian Carter, because Carter "hadn't been taking care of him" around Christmas time. Robb believed Greco would close licensing subagencies that did not give him a campaign contribution or a "Christmas present".

Robb testified that in both 1981 and 1982, he paid Greco $500 at Christmastime so Greco would close down Carter's agency. During that period of time, John Santo worked as a messenger for Greco's office. Greco had previously advised Robb that his "Christmas present" should be placed, in cash, in a plain envelope marked to Greco's attention and left for pick up by Santo. Santo recalled picking up and delivering envelopes marked "personal" to Greco's attention. Santo would either deliver them personally to Greco or place them on Greco's desk, which was located close to Santo's desk.

We come now to Count 3. By late 1983, Robb had decided not to give Greco his annual "Christmas present" because the Carter agency had not been closed down. In December, however, Greco phoned to ask if Robb "had forgot about him" and his "Christmas present". Then, between Christmas 1983 and February 1984, Robb began having trouble with the auditor's office. According to Robb and Smith, this caused Robb to send

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[4] Greco was acquitted of certain payments made in 1981 and 1982, but evidence concerning events in those years forms the backdrop for other counts on which he was convicted.

Greco $500 in cash. Robb testified the payment was "to get [Greco] off my back." Robb obtained the $500 by cashing a check prepared by Smith. On the back of the check, Smith had noted Greco's initials, "DG" for Dick Greco. After Robb paid the $500, his trouble with the auditor's office came to an end.

We come next to Count 4. Around 1985, Greco was advised that Robb was engaging in a number of illegal activities related to his licensing subagency. Greco confronted Robb with these allegations, demanding that Robb resign from his licensing subagency agreement. Robb was "disagreeable" and physically threw Greco out of his office. Soon thereafter, in December, 1985, the State Department of Licensing found significant problems in the operation of Robb's licensing subagency, and it recommended that the subagency be permanently closed down. However, only Greco had the authority to do that. Greco informed Robb of the recommendation and sent Robb a copy of the State's letter. Robb contacted Mead McDonald, who operated another subagency that was being threatened with closure. Robb and McDonald each decided to send Greco $500, in the hope this would deter him from closing them down. They sent the money by means of the messenger for the auditor's office. A few days later, Robb called Greco and asked if Greco had received his "card". After Greco said he had, Robb asked if Greco could help prevent the State from closing down his and McDonald's agencies. Greco said, "He would do what he could to help us." [5] Ultimately, Robb and McDonald were put on probation rather than being closed down.

We come next to Count 8. Howard Forbes testified that whenever he saw Greco, Greco would comment that he was being pressured to allow other licensing subagencies in the same area as Forbes's. Around Christmas, 1982, Forbes went to Greco's office, where he handed

[5] RP 588.

Greco $250 in cash in a plain envelope. Greco did not count the money in Forbes's presence, but Forbes had barely gotten back to his office when Greco called. According to Forbes, Greco stated, "Howard, you're short." [6] Forbes replied, "I must have made a mistake, I'll bring you the other $250." [7] Still according to Forbes, he realized at that time that "the Christmas gift versus any other thing you want to call it ceased because you don't go back and ask for more Christmas presents." [8] Forbes then took Greco another $250, "and that began to set the precedent for Christmas." [9]

We come next to Count 9. Around Christmas, 1983, Forbes met with Greco and gave him $500 in a plain envelope. The two men discussed the possibility of Greco's permitting competing subagencies to operate in Forbes's locale. Forbes indicated his agency could take care of existing needs, and he thought he was paying the money as a means of dissuading Greco from permitting competing subagencies to operate.[10]

We come next to Count 11. In 1985, Forbes and David McCallum agreed with Greco that Greco would provide messenger service to their subagencies for $1,500, and that he also would receive $500 as a "Christmas

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[6] RP 217.

[7] RP 217.

[8] RP 217.

[9] RP 217.

[10] Although not necessarily directed at events in 1983, the following colloquy took place regarding Forbes's reason for making payments to Greco:

> Q: "Mr. Forbes, if the defendant as the county auditor had not been able to either set up a competing business with your business or take your license away, would you have given him any Christmas present?"
>
> A: "I see no reason to."

RP 260.

present". However, in December, 1985, McCallum called Forbes and said, "Dick [Greco] wants his $2,000." [11] Greco chose to have the money sent through the delivery service rather than having it personally delivered by Dena McCallum, because as he told her, "He didn't want to be seen with [McCallum] any more than necessary." Later, however, Greco returned the $2,000. Forbes then testified:

> A: I called him on the phone after Mr. McCallum told me that he returned the $2,000 to the office, that he wasn't going to do that anymore.
>
> Q: And what did you say to Mr. Greco?
>
> A: I said, "What gives?"
>
> Q: What was his response?
>
> A: Well, I'm not going to do that anymore. I said, including the $500 Christmas money? I said, wouldn't you still like that, and he said, yes, I would. So I took $500 out of the $2,000 and sent it in to him by messenger this time, at his request. By messenger, I mean the man who picks up the licenses.
>
> Q: Whose idea was it to send it via the messenger?
>
> A: His. I told him I'd bring it into him, and he said no, just give it to John in the morning.

When asked why he paid money to Greco, McCallum testified, "When . . . you know that your contract can be terminated, you tend not to make waves and pay what is asked." [12]

We come next to Count 13. As early as 1978, Greco intimated to McDonald that he would open competing subagencies in McDonald's locale if McDonald did not take care of him. Before 1981, Greco had refused to accept his "Christmas present" in the form of a check; instead, he requested cash. On December 22, 1981, Mc-

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[11] RP 226.

[12] RP 133.

Donald sent cash to Greco by means of the auditor's office messenger. Before sending the money, however, McDonald recorded the serial numbers of the bills on a piece of paper, Exhibit 27, on which he also wrote, "Mr. G—12/22/81." McDonald made the payments because he was afraid Greco would close him down if he did not. As McDonald testified:

> I got the feeling from [Greco] that if I didn't cooperate and support him in his campaign contributions, that there might very well be another agency out within three miles of me, which would be very detrimental to my livelihood.[13]

We come next to Count 14. In the spring of 1982, Greco advised McDonald that he wanted an $800 campaign contribution for his upcoming re-election campaign. This "request" was made in the context of comments by Greco to McDonald relating that Greco was under pressure to open competing licensing subagencies in McDonald's area. McDonald sent the $800, in cash, in an envelope marked "Personal". The envelope was given to the same Pierce County messenger who took mail between the auditor's office and McDonald's place of business. According to the testimony, Greco chose the amount, the method of delivery, and the fact that the word "Personal" should appear on the envelope.

We come next to Count 15. Around Christmas of 1984, McDonald received a phone call from Greco. McDonald went on to testify:

> A: He [Greco] indicated that I had forgotten to send him a Christmas present in 1983 and that he thought that it would be apropos to send one in 1984, including the 1983 present. As I recall, it was something like $200 per year for a total of $400.
>
> Q: Who set the amount of $200 a year?
>
> A: Mr. Greco did at that time.

---

[13] RP 859; *see* RP 861.

Q: Had you in fact forgotten the Christmas present in 1983?

A: I had purposely forgotten the present in 1983, yes.

. . .

Q: What did you do after talking with the defendant around December of 1984 about the money?

A: I put $400 into an envelope, marked it "personal," put his name on the outside of it, and sent it in with our daily work, either the next day or the day after, I couldn't be absolutely, it was in a sealed envelope.

We come next to Count 16. On election day in November, 1985, McDonald and Greco met outside the front entrance of McDonald's place of business. McDonald described the conversation as follows:

A: Well, I don't know that I can remember every exact word, but Mr. Greco prefaced his statement with me by indicating that he had been under some pressure to open another agency south of our location because that's where the population growth apparently had been growing, but he did not want to do so at that time because he felt that we were serving the area as adequately as anyone else would be.

Q: What else did he say in that same conversation?

A: And then indicated that he was going to be running for reelection in 1986 and that he wanted to get his campaign started or words to that effect anyway, and that I should be thinking about making a campaign contribution of, as I recall, $1,000 payable $500 in the near future and $500 sometime in the spring.[14]

Viewed in the light most favorable to the State, the evidence on each count supports reasonable inferences

[14] RP 773-74.

that Greco, with corrupt intent, requested and accepted money based on the understanding, fostered by Greco, that he would use his official position to benefit each payor. Thus, the evidence on each count was sufficient to support conviction.[15]

EFFECTS OF REMAND FOR SUPPLEMENTAL FINDINGS

Greco makes two arguments arising from this court's previous remand for entry of findings. One relates to double jeopardy, the other to CrR 3.3. Each rests on the premise that Greco was tried a second time when supplemental findings were entered.

Preliminarily, this premise is false. This court's remand to the trial court was part of the appellate process, not part of the trial process. This court needed additional findings in order to complete its review, and the remand was so that supplemental findings could be entered. Remand for that purpose was not equivalent to remand for retrial, and this court did not authorize retrial or the taking of additional evidence. Following this court's directions, the trial court did not retry Greco or take new evidence; it merely entered supplemental findings based on evidence produced at the original trial.

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[15] In his reply brief, Greco says, "The question presented here is whether an inference can follow under a situation where the evidence is consistent with two different interpretations." Reply Brief, at 1. He cites and relies on *State v. Jackson*, 112 Wn.2d 867, 774 P.2d 1211 (1989), a case in which the issue was whether the trial court could instruct the jury on a presumption or inference.

The argument is incorrect and *Jackson* is inapropos. When dealing with the sufficiency of evidence on appeal, an appellate court must take the evidence, including the inferences reasonably therefrom, in the light most favorable to the State. *Jackson v. Virginia*, 443 U.S. at 319; *Salinas*, 119 Wn.2d at 201; *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). When deciding whether to give a presumption or inference instruction, that is not necessarily the case, for the reasons explained at length in *State v. Delmarter*, 68 Wn. App. 770, 845 P.2d 1340 (1993).

A. Double Jeopardy

Greco says his right against double jeopardy was violated when the trial court entered supplemental findings of fact on an essential element of each bribery conviction. *See State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991). Ordinarily, double jeopardy is not violated when a defendant is retried following reversal by an appellate court. *United States v. Tateo*, 377 U.S. 463, 12 L. Ed. 2d 448, 84 S. Ct. 1587 (1964); *State v. Dowling*, 98 Wn.2d 542, 543, 656 P.2d 497 (1983). However, double jeopardy is violated when a defendant is retried following a trial in which the State failed to present sufficient evidence. *Hudson v. Louisiana*, 450 U.S. 40, 67 L. Ed. 2d 30, 101 S. Ct. 970 (1981); *Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S. Ct. 2141 (1978); *Dowling*, 98 Wn.2d at 544.

The way in which these rules apply to supplemental findings was recently described in *State v. Austin*, 65 Wn. App. 759, 761-62, 831 P.2d 747 (1992). The court said:

> Normally, when the trial court fails to enter a finding as to an element of the crime charged, "vacation and remand, not reversal, is the appropriate disposition." *State v. Jones*, 34 Wn. App. 848, 851, 664 P.2d 12 (1983). However, if the record is devoid of any evidence to support the omitted finding, then reversal is appropriate, since to allow either party to present additional evidence would violate the double jeopardy clause by giving the prosecution another opportunity to supply evidence which it failed to muster in the first proceeding. *State v. Souza*, 60 Wn. App. 534, 540-41, 805 P.2d 237, *review denied*, 116 Wn.2d 1026 (1991); *see also Burks v. United States*, 437 U.S. 1, 57 L. Ed. 2d 1, 98 S.Ct. 2141 (1978) ("[t]he Double Jeopardy Clause forbids a second trial for the purpose of affording the prosecution another opportunity to sup-

ply evidence which it failed to muster in the first proceeding").

State v. Souza, 60 Wn. App. 534, 805 P.2d 237, *review denied*, 116 Wn.2d 1026 (1991), is illustrative. There, the trial court found the defendant guilty of second degree theft. However, it failed to enter a finding on whether the offender had an intent to deprive. The State asked the appellate court to remand so a supplemental finding could be entered. The defendant opposed the request, arguing that remand would violate double jeopardy. The appellate court held that because sufficient evidence had been presented at the first trial, because the offender had been found guilty at the first trial, and because "[t]he insufficiency of the findings [could] be cured without the introduction of any new evidence," remand would not violate double jeopardy. *Souza*, 60 Wn. App. at 541. It also noted that the trial court's failure to make the needed finding was more likely due to trial error than to the fact that the trial court had not been convinced of the existence of such intent beyond a reasonable doubt. 60 Wn. App. at 540.

State v. Pena, 65 Wn. App. 711, 829 P.2d 256 (1992), is inapposite. There, the appellate court held that remand would not be appropriate in light of JuCR 7.11(d). It did not consider or decide whether remand would violate double jeopardy.

The gist of these cases is that where the evidence at trial was sufficient to support findings, an appellate court may remand for entry of findings that it needs in order to carry out its review. Here, the evidence was sufficient, and we simply remanded for entry of needed findings. No new evidence was taken while the trial court had jurisdiction of the case; no jurors or witnesses were sworn, and no other trial-like proceedings took place. It follows that Greco was not tried or put in jeopardy a second time.

B. Speedy Trial

Greco next argues that the delay between June 22 and January 25 violated his right to speedy trial. He cites and relies on CrR 3.3(d)(4), which establishes a 60/90 day period for retrial "[i]f a cause is remanded for trial . . . ."

For three reasons, the time limits in CrR 3.3(d)(4) were not violated while the case was on remand for supplemental findings. First, the time limits in CrR 3.3 do not govern while a case is on appeal, *State v. LeRoy*, 84 Wn.2d 48, 50, 523 P.2d 1185 (1974), and the remand for supplemental findings was part of the appellate process. Second, even if CrR 3.3 is assumed to apply, it contains no time limits that govern entry of supplemental findings. Third, the portion of the rule on which Greco relies, CrR 3.3(d)(4), is by its plain terms applicable only when a cause is remanded *for trial.* Here, the remand was not for trial, but for entry of supplemental findings.

Lastly, Greco argues that this case is not "ripe" for review, but that argument is devoid of merit. This court previously vacated his sentence only for the purpose of allowing entry of supplemental findings. *See* 57 Wn. App. at 206-07. Because such findings have now been entered, the case is ripe for the completion of review.

The judgment and sentence on the nine bribery counts is affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/s/ Morgan, J.

We Concur:

/s/ Alexander, C. J.

/s/ Lenfeld, J.

APPENDIX C

[Filed Jan. 19, 1988]

IN THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

No. 86-1-01747-1

STATE OF WASHINGTON,
Plaintiff,
v.
RICHARD A. GRECO,
Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause having come on for trial commencing on the 13th day of October, 1987, before the undersigned judge of the above-entitled court; the state of Washington being represented by Gregory P. Canova, Senior Assistant Attorney General for the state of Washington, and Gerald Horne, Senior Deputy Prosecuting Attorney for Pierce County; the defendant, Richard A. Greco, appearing in person and represented by Monte E. Hester, having waived his right to a trial by jury; the Court having heard the testimony of the witnesses and the arguments of counsel, and being fully advised in the premises, now makes and enters the following:

FINDINGS OF FACT

I

At all times during the period of January 30, 1971 through July 31, 1986, the defendant, Richard A. Greco served as the duty elected Pierce County Auditor;

II

In his capacity as Pierce County Auditor, the defendant had the authority, at his complete discretion, to appoint or terminate the appointment of individuals to work as his subagents for the performance of vehicle licensing functions in Pierce County;

III

Walter Robb was appointed by the defendant as a licensing subagent in 1981, and began the operation of his Pierce County licensing subagency, called the Active Military subagency, in July of 1981;

IV

In February, 1984, Robb paid the defendant Five Hundred Dollars ($500) cash in belated response to a telephone call from the defendant in December of 1983 wherein the defendant asked Robb where the defendant's Christmas present was; Robb's payment of the $500 was due to this telephone call and due to prior statements made by the defendant regarding the defendant's intention to close down a competing licensing subagency, owned by Marion Carter, due in part to the defendant's dissatisfaction with Carter because she had not "taken care of him" at Christmas time;

V

Based upon prior conversations with and actions of the defendant, Walter Robb paid $500 cash to the defendant in December, 1985 to keep the defendant from terminating Robb's appointment as a licensing subagent;

VI

At all times relevant to this case, Howard Forbes was a licensing subagent for Pierce County, appointed by the defendant, who operated his own licensing subagency business or operated a licensing subagency in conjunction with business partners David and Dena McCallum, or was

otherwise acting on its behalf and as its agents for purposes of dealing with defendant, in Pierce County, David McCallum having been appointed a licensing subagent by the defendant;

VII

Between November 1, 1982 and December 31, 1982, Forbes paid the defendant $500 cash, based on conversations with the defendant, to deter the defendant from appointing another licensing subagent to compete with Forbes or the Forbes/McCallum licensing subagency;

VIII

Between November 1, 1983 and December 31, 1983, Forbes and the McCallums paid the defendant $500 in cash, based upon conversations with the defendant, in order to deter the defendant from appointing another licensing subagent who would be in competition with the Forbes/McCallum licensing subagency;

IX

Between November 1, 1985 and December 31, 1985, Forbes and the McCallums paid the defendant $500 in cash for the same reasons as set forth in Findings of Fact VII and VIII above;

X

Between October 1, 1985 and December 31, 1985, Forbes and the McCallums, at the defendant's request, paid the defendant $1500 in cash in exchange for the defendant's providing a Pierce County employee, who was working under the defendant's supervision, to pick up the daily paperwork generated by the Forbes/McCallum licensing subagency and deliver that paperwork to the County Auditor's Office;

XI

At all times relevant to this case, Mead McDonald was a licensing subagent for Pierce County, having been appointed by the defendant;

XII

Between November 1, 1981 and December 31, 1981, McDonald paid the defendant between $250 and $500 cash, based upon conversations with the defendant, in order to either prevent the defendant from appointing a licensing subagency to compete with McDonald or to prevent the defendant from hindering or closing the operation of McDonald's licensing subagency;

XIII

Between October 1, 1982 and December 31, 1982, McDonald paid the defendant cash, based upon conversations with the defendant and for the same reasons set forth in number XII above;

XIV

Between November 1, 1984 and December 31, 1984, McDonald paid the defendant $400 cash, based upon conversations with the defendant and for the same reasons set forth in numbers XII and XIII above;

XV

Between November 1, 1985 and December 31, 1985, McDonald paid the defendant between $400 and $500 cash, based upon conversations with the defendant and for the same reasons as set forth in numbers XII, XIII, and XIV above;

XVI

The events recited above occurred in Pierce County, Washington.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

I

The Court has jurisdiction of the subject matter and the defendant herein;

II

The defendant is guilty of the crime of Bribery, RCW 9A.68.010(1)(b), as charged in Counts III, IV, VIII, IX, XI, XIII, XIV, XV, and XVI.

III

The defendant is guilty of the crime of Misconduct of a Public Officer, RCW 42.20.010(3) as charged in Count XII.

DONE in open court this 14th day of January, 1988.

/s/ Anthony P. Wartnik
ANTHONY P. WARTNIK
Judge

Presented by:

/s/ Gregory P. Canova
GREGORY P. CANOVA
Senior Assistant Attorney General

/s/ Gerald A. Horne
GERALD HORNE
Senior Deputy Prosecuting Attorney for Pierce County
Attorneys for Plaintiff

/s/ Monte E. Hester
MONTE E. HESTER
Attorney for Defendant

APPENDIX D

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

No. 12015-1-II

Division Two

THE STATE OF WASHINGTON,
Respondent,

v.

RICHARD A. GRECO,
Appellant.

Filed: March 14, 1990

REED, J.—Richard Greco, former Pierce County Auditor, appeals his Pierce County bribery and official misconduct convictions. We affirm the misconduct conviction. Because the bribery findings of fact are inadequate, we vacate those convictions and remand for further findings.

A special inquiry, attended by then Pierce County Prosecuting Attorney William Griffies, was held to gather evidence regarding allegations of Greco's misconduct. After the inquiry the State charged Greco with several counts of bribery under RCW 9A.68.010(1)(b) and official misconduct under RCW 42.20.010(1) & (2). The State alleged that Greco accepted bribes for awarding vehicle licensing subagencies to particular persons. Greco also was charged with providing county employees as

messengers for an agency in return for payments which he pocketed, a violation of RCW 42.20.010(3).

The counts involved three agencies and five individuals: Walter Robb; Howard Forbes, and Dena and David McCallum (the Forbes/McCallum agency); and Mead McDonald. The court, sitting without a jury, convicted Greco of nine bribery counts and one official misconduct count. He was acquitted of the remaining counts.

Bribery counts III (1983-84) and IV (1985) involved Robb. Robb believed that Greco would close agencies that did not contribute monies for his campaign fund or as Christmas gifts. Robb paid Greco $400 in 1984 after having trouble with Greco's office and receiving Greco's call that Greco had not received his 1983 payment. Robb also paid Greco $500 in 1985.

Bribery counts VIII (1982), IX (1983), and XI (1985) involved the Forbes/McCallum agency. In 1982 Forbes paid Greco $250, understanding that the payment was to dissuade Greco from permitting the establishment of competing agencies. Afterward, Greco called Forbes and said "Howard you are short." Forbes then paid Greco an additional $250. Forbes also paid $500 in 1983.

Greco told Dena McCallum that the arrangement was $500 for the yearly payment and $1500 for messenger service. Her agency paid Greco $2,000 in 1985: a $500 Christmas payment and $1,500 for messenger service. The agency made the Christmas payment because Greco talked of authorizing a competing agency. A county employee testified that he collected paperwork from the agency. Greco returned the $2,000, saying he did not need it just then, but later asked for $500, which David McCallum paid. The court found Greco guilty of official misconduct (Count XII) for using a person in his employ for his personal benefit, in violation of RCW 42.20.010(3).

Bribery counts XIII (1981), XIV (1982), XV (1984), and XVI (1985) involved McDonald. McDonald paid unknown amounts in 1981 and 1982, $400 in 1984, and $500 in 1985 hoping to prevent closure of his agency or establishment of a competing agency. McDonald increased the 1984 payment because Greco told him that he, McDonald, had missed the 1983 payment.

I.

SPECIAL INQUIRY PROCEEDING.

A. Did Griffies Have a Conflict of Interest?

The first issue is whether Prosecutor Griffies was not authorized to participate in the special inquiry because of a conflict of interest. Greco argues that because of Griffies' unauthorized appearance the information must be set aside, relying upon RCW 10.40.070(3). We review *de novo* the trial court's decision not to disqualify the prosecutor. *See State v. Stenger*, 111 Wn.2d 516, 521-22, 760 P.2d 357 (1988).

For a conflict of interest to arise under RPC 1.9, the prosecutor must have "previously personally represented or been consulted professionally by an accused with respect to the offense charged" or closely related matters. *Stenger*, 111 Wn.2d at 520. In *Stenger* the prosecutor was disqualified from prosecuting the defendant because he had represented him in a previous criminal action and the court believed that information learned in the previous representation might influence the prosecutor's discretionary decision of whether to seek the death penalty. *Stenger*, 111 Wn.2d at 521.

The prosecutor is the legal advisor to all county officers. RCW 36.27.020. As such, Griffies' office represented Greco as the county auditor in numerous cases. However, the record is bereft of any evidence that the office represented Greco in his personal affairs. Because

he was not privy to any information personal to Greco, Griffies could not be said to have used improperly any such information in prosecuting Greco. Neither is any information Griffies obtained in the previous cases shown to be interwoven with the facts of this case. Thus, Griffies did not have a conflict of interest.

B. If Griffies Was Not Authorized to Attend the Special Inquiry, Must the Information Be Quashed?

Even if Griffies was not authorized to attend the special inquiry, the information need not be quashed. RCW 10.27.080 addresses who may attend both grand juries and special inquiry courts. However, RCW 10.40.070 (3), on which Greco relies, states only that *indictments* must be set aside when an unauthorized person attended the proceeding. The statute does not address special inquiries, or speak to informations.

Under the rules of statutory construction, the specific inclusion of one item in a category excludes implication of other items of the same category (*expressio unius est exclusio alterius*). *State v. Sommerville*, 111 Wn.2d 524, 535, 760 P.2d 932 (1988). By including grand juries, but not special inquires, the Legislature implicitly chose not to invalidate special inquiry proceedings because of the attendance of unauthorized persons. We decline to extend the invalidation.

II.

CONSTITUTIONALITY OF RCW 9A.68.010(1)(b)

A. Is the Statute Overbroad?

The next issue is whether 9A.68.010(1)(b)[1], the bribery statute, is overboard. A statute is overbroad if

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[1] RCW 9A.68.010 reads in pertinent part as follows:

(1) A person is guilty of bribery if:

(a) With the intent to secure a particular result in a particular matter involving the exercise of the public servant's

it punishes innocent or constitutionally-protected activity. *State v. O'Neill*, 103 Wn.2d 853, 858, 700 P.2d 711 (1985). The *O'Neill* court found that an implied element of corrupt intent was required to uphold RCW 9A.68.010 (1)(a). *O'Neill*, 103 Wn.2d at 859. The court then also found that the element was in fact implied, because the Legislature is presumed not to have intended to enact an unjust or unconstitutional law. *O'Neill*, at 859. It is equally reasonable to imply corrupt intent in RCW 9A.68.010(1)(b). The only difference between §§ (a) and (b) is that the former refers to the giver of the bribe and the latter refers to the taker. We see no reason to differentiate between the two sections insofar as the mental element is concerned. Finding that the corrupt intent element is implied in the statute ensures that protected activity will not be punished; with the necessary element thus supplied, the statute is not overbroad.

B. Is the Statute Impermissibly Vague?

We turn next to Greco's contention that the statute is vague because it fails to define "agreement or understanding." "'A statute is void for vagueness under the Fourteenth Amendment if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.'" *O'Neill*, 103 Wn.2d at 859. In our view, a person of common intelligence would conclude that "agreement or understanding" as used in the statute means "mutual agree-

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vote, opinion, judgment, exercise of discretion, or other action in his official capacity, he offers, confers, or agrees to confer any pecuniary benefit upon such public servant; or

(b) Being a public servant, he requests, accepts, or agrees to accept any pecuniary benefit pursuant to an agreement or understanding that his vote, opinion, judgment, exercise of discretion, or other action as a public servant will be used to secure or attempt to secure a particular result in a particular matter.

ment," a definition cited by Greco in his brief. The statute is not impermissibly vague.

III.

EQUAL PROTECTION

Greco argues that the State's unbridled discretion in deciding whether to charge a felony under RCW 9A.68.010 (1)(b) (bribery) or a misdemeanor under RCW 42.20.010(1) and (2) (official misconduct), denied him equal protection. The equal protection guarantee is violated if "the elements of the statutes prohibiting the behavior [are] 'the same or essentially the same.'" *State v. Sherman*, 98 Wn.2d 53, 61, 653 P.2d 612 (1982). It would be unreasonable and inequitable to allow the prosecutor to seek and have imposed varying degrees of punishment for the same criminal acts. *State v. Ensminger*, 77 Wn.2d 535, 536, 463 P.2d 612 (1970). However, equal protection is not violated where the crimes contain different elements. *In Re Taylor*, 105 Wn.2d 67, 68, 711 P.2d 345 (1985).

The State did not have unfettered discretion in charging Greco. RCW 42.20.010(1) and (2) do not include the corrupt intent or agreement elements contained in RCW 9A.68.010(1)(b). Because the crimes contain different elements, charging Greco under the bribery statute did not deny him equal protection.

IV.

ARE RCW 42.20.010 AND 9A.68.010(1)(b) CONCURRENT?

Greco argues that he may be charged only with official misconduct under RCW 42.20.010(3)—which he labels the special statute—and that he may not be charged with bribery under RCW 9A.68.010(1)(b)—which he labels the general statute. If the statutes are concurrent, the special statute applies to the exclusion of the general.

State v. Cann, 92 Wn.2d 193, 197, 595 P.2d 912 (1979). Statutes are concurrent if "the general statute will be violated in each instance where the special statute has been violated." *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). This rule applies even though the special statute includes elements not included in the general statute. *State v. Danforth*, 97 Wn.2d 255, 257-59, 643 P.2d 882 (1982). Any other rule would frustrate the legislative intent to treat the subset of activity (the crime defined by the special statute) apart from the general scheme. *Danforth*, 97 Wn.2d at 257-59.

The statutes in question here are not concurrent. RCW 9A.68.010(1)(b) requires corrupt intent and an agreement to accomplish a particular result. Those elements are not included in the official misconduct statute. Assuming *arguendo* that the general and special labels apply, the general statute will not be violated in every instance in which the special statute is violated. Therefore, it was proper to charge Greco under the bribery statute.

V.

SUFFICIENCY OF THE FINDINGS AND CONCLUSIONS.

Findings of fact are required in judge-tried cases in order to support a conviction, and should separately state the factual basis for the legal conclusions as to each element of the crime. *State v. Russell*, 68 Wn.2d 748, 750, 415 P.2d 503 (1966). Without comprehensive, specific written findings, the appellate court cannot properly review the trial court's resolution of the disputed facts and its application of the law to those facts. *Russell*, 68 Wn.2d at 750-51.

Here, the trial court's bribery findings are inadequate. We cannot be sure the trial court found all the necessary elements. An agreement by Greco to exercise his discretion in return for cash payments may be inferred from

the findings of fact, but it is not clear that the judge actually concluded that there was such an agreement. The findings also fail to address the element of corrupt intent.[2]

Because the findings are incomplete, we vacate the bribery convictions and remand for entry of further findings. *See Russell*, 68 Wn.2d at 755-56; *State v. Jones*, 34 Wn. App. 848, 851, 664 P.2d 12 (1983).

Because the trial court's findings are inadequate, Greco's challenge to the sufficiency of the evidence to support a conviction on the bribery counts must abide the entry of new findings.

VI.

OFFICIAL MISCONDUCT.

The next issue is whether the one official misconduct charge should be dismissed because Greco returned the messenger service payment. RCW 42.20.010(3) prohibits a public officer from using one in his employ for private benefit. A statute should be interpreted to achieve its purpose, avoiding absurd results. *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). Here, the crime was complete upon receipt of the money. In fact, however, when Greco returned the funds he explained that he might not need campaign money, but, if needed he would ask for it. Greco's return of the money did not absolve him of the offense and the finding of guilt was proper.

Because the trial court will be confronted with the issues upon remand, we will address Greco's challenges to his sentencing.

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[2] It is apparent from the trial judge's memorandum opinion that, in light of *State v. O'Neill*, 103 Wn.2d 853, 700 P.2d 711 (1985), he believed the necessary element of corrupt intent could be supplied by implication. The memorandum opinion, however, cannot fill the void in findings of fact in criminal cases where the omissions consist of the basic elements of the crime.

VII.

REFUSAL TO SENTENCE AS FIRST-TIME OFFENDER.

Greco contends that the trial court erred by declining to treat him as a first-time offender. He argues that the trial court declined to consider first-time offender status only because Greco did not need treatment for substance abuse or mental infirmities. Whether to use the first-time offender provisions of RCW 9.94A.120(5) is within the trial court's discretion. *State v. Welty*, 44 Wn. App. 281, 284, 726 P.2d 472, *review denied* 107 Wn.2d 1002 (1986); *State v. Boze*, 47 Wn. App. 477, 481, 735 P.2d 696 (1987). Here, the record shows that the trial court carefully weighed the factors for and against first-time offender status. There was no abuse of discretion.

VIII.

OFFENDER SCORE.

Greco argues that his offender score was computed incorrectly because the trial court did not consider all the counts to be the same offense under RCW 9.94A.400.[3]

The trial court's determination of what is the same criminal conduct is reviewed for abuse of discretion and misapplication of the law. *State v. Collicott*, 112 Wn.2d 399, 404, 771 P.2d 1137 (1989).

Crimes are part of the same criminal conduct if they arise from the same course of conduct and are intimately related or if "one crime furthered the other and if the

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[3] RCW 9.94A.400(1)(a) provides in pertinent part as follows:

> [I]f the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime . . . "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

time and place of the two crimes remained the same." *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). Neither are crimes involving different victims the same criminal conduct. *Dunaway*, 109 Wn.2d at 215.

Greco's briberies involved three agencies and five individuals. The trial court did not err in computing Greco's offenders score.

CONCLUSION.

The judgment and sentence for the official misconduct count (RCW 42.20.010(3)) are affirmed. The judgment and sentence on the bribery counts is vacated and remanded for entry of further findings of fact and conclusions of law, after the filing of which with this court, their sufficiency, and the sufficiency of the evidence, will be addressed.

/s/ Reed, J.

WE CONCUR:

/s/ Alexander, C.J.

/s/ Mitchell, J. Pro Tem

APPENDIX E

THE SUPREME COURT OF WASHINGTON

25700-X-240

ORDER ON JUNE 5, 1990
PETITION FOR REVIEW
CALENDAR

Department I of the Court having considered the following Petitions for Review on its June 5, 1990, Petition for Review Calendar; Now, therefore, it is hereby

ORDERED:

A. The following Petitions for Review are denied:

* * * *

Division II

State v. Richard A. Greco
Court of Appeals No. 12015-1-II
Supreme Court No. 57079-5

* * * *

DATED at Olympia, Washington, this 5th day of June 1990.

/s/ Keith M. Callow
Chief Justice

APPENDIX F

[Filed Jan. 29, 1991]

IN THE SUPERIOR COURT
IN THE STATE OF WASHINGTON
FOR PIERCE COUNTY

No. 86-1-01747-1

STATE OF WASHINGTON,
Plaintiff,

vs.

RICHARD A. GRECO,
Defendant.

SUPPLEMENTAL FINDINGS OF FACT

THIS MATTER having come before the Court on the 20th day of December, 1990, pursuant to the decision in *State v. Greco,* 57 Wn. App. 196, 204-205 (1990), for entry of Supplemental Findings of Facts; the State of Washington being represented by Gregory P. Canova, Senior Assistant Attorney General; the defendant, Richard A. Greco, appearing in person and represented by Monte E. Hester; the Court having reviewed the report of proceedings previously filed herein, and having heard the arguments of counsel, now makes and enters the following Findings of Fact to supplement the Findings of Fact and Conclusions of Law entered previously herein on 14th day of January, 1988:

FINDINGS OF FACT

I

Between December 1, 1983 and February 29, 1984, Greco had advised Robb that the money for his belated "Christmas present" was to be placed, in cash, in a plain envelope marked to Greco's attention and left for pickup by the Pierce County messenger for delivery to Greco. John Santo worked as a Pierce County messenger for Greco's office during this period of time, February 1984, and recalls picking up and delivering such kinds of items. Santo would either deliver them personally to Greco or place them on Greco's desk, which was located close to Santo's desk. The payment of this money was made pursuant to an understanding or agreement between Robb and Greco that, in exchange for this money, Greco would use his authority to close down a competing licensing subagency, run by Marian Carter.

II

In the late summer or early fall of 1985, Greco was advised that Robb was engaging in a number of illegal activities relating to his licensing subagency. When Greco confronted Robb with these allegations and demanded that Robb resign from his licensing subagency agreement, Robb physically threw Greco out of his office.

III

By December, 1985, the State Department of Licensing had found significant problems in the operation of Robb's licensing subagency, and the Department recommended to Greco that he permanently close down Robb's agency, as Greco had the sole authority to do. Based upon Greco's prior violent encounter with Robb (set forth above) the unrefuted findings of the Department of Licensing and their recommendation for termination of Robb's agency relationship, there was no reason for Greco to allow Robb

to continue with the licensing subagency except for the illegal payments previously received from Robb.

IV

In December of 1985, Robb paid Greco $500.00 in cash pursuant to an understanding with Greco that Robb would be allowed to continue his licensing subagency operation.

V

Between November 1, 1982 and December 31, 1982, Howard Forbes payment of $500.00 in cash to Greco was made pursuant to an agreement or understanding between Forbes and Greco that Greco would not open any competing licensing subagencies, in exchange for this payment.

During and subsequent to the period of time between November 1, 1982 and December 31, 1982, Greco intentionally created the impression with Forbes that Forbes needed to continue making cash payments to Greco in order to insure the economic health of his licensing subagency, even after Mr. and Mrs. McCallum had begun running the agency as his successors. Greco also gave Forbes the clear impression that if Forbes, and later the McCallum's, did not continue to comply with Greco's cash demands, that Greco would replace them with a licensing subagent who would agree to Greco's terms.

VI

Between November 1, 1983 and December 31, 1983, Forbes again gathered $500.00 in cash and sent it to Greco in an envelope, via the Pierce County messenger in Greco's employ, pursuant to his understanding with Greco that the payment was necessary in order to maintain Greco's support for the ongoing operation of the licensing subagency.

VII

Between November 1, 1985 and December 31, 1985, Forbes and the McCallum's paid Greco a $500.00 "Christmas gift", pursuant to the same understanding outlined above, as part of a total package of $2,000.00, which included the $1,500.00 Greco had said it would cost the agency to obtain the benefit of the Pierce County messenger service, which was under Greco's control. As Greco made clear, all of the money was to be paid in cash, via his messenger service.

VIII

Between November 1, 1981 and December 31, 1981, Mead McDonald continued his practice of cash payments to Greco. This payment was made pursuant to an agreement or understanding between McDonald and Greco, that, in essence, it was necessary to buy Mr. Greco's continuing favorable treatment of McDonald's licensing subagency. Greco had intentionally created apprehension in McDonald that failure to make cash payments to Greco could jeopardize his subagency. Between 1978 and 1979, McDonald had attempted to make these payments to Greco by check, but the checks had been returned by Greco and Greco had advised him the payments had to be made in cash.

IX

Between October 1982 and December 31, 1982, McDonald again made cash payments to Greco pursuant to their agreement or understanding that such payments were necessary in order to prevent Greco from establishing a competing subagency or otherwise interfering with McDonald's subagency operation.

X

In 1982, Greco advised McDonald that he wanted an $800.00 campaign contribution from McDonald for Greco's upcoming campaign for re-election. This "re-

quest" was made in the context of comments by Greco to McDonald relating that Greco was under pressure to open competing licensing subagencies in McDonald's area. The $800.00 was paid, in cash, and delivered in an envelope marked "Personal" to Greco and was picked up by the Pierce County courier who picked up the regular mail for the auditor's office from McDonald's business. The amount, method of delivery and the information marked on the envelope were all dictated by Greco to McDonald.

XI

Between November 1, 1984 and December 31, 1984 Greco telephoned McDonald and demanded that McDonald double the amount of Greco's "Christmas present", since Greco had not reecived any present from McDonald in 1983. Based on that conversation with Greco and on Greco's prior comments about the pressure to open competing licensing subagencies, McDonald, pursuant to his understanding with Greco, sent Greco $400.00 in cash feeling that if he did not, Greco would terminate his licensing subagency and find someone else who would provide him with "Christmas presents".

XII

Between November 1, 1985 and December 31, 1985, McDonald paid Greco between $400.00 and $500.00 pursuant to his understanding with Greco that such payment would assure McDonald's continuing operation of his licensing subagency. McDonald was also aware that the Department of Licensing's audit recommendation for termination of his subagency had been rejected by Greco in lieu of a probationary status, controlled entirely by Greco. All of this made it clear to McDonald that Greco could and would terminate the subagency unless such payment was received.

XIII

Greco contacted McDonald at his place of business, on election day of 1985 (November 3rd or 4th), and asked McDonald to step outside of his office building in order to discuss a matter. Once outside, Greco advised McDonald that he would be expecting a $1000.00 campaign contribution from McDonald, to be made in two increments: $500.00 to be paid in December of that year and a second $500.00 to be paid in the spring of 1986. Before advising McDonald of the campaign contribution requirement, Greco commented again about the pressure he was under to open a competing licensing subagency in McDonald's area.

XIV

While this court found the defendant not guilty of Count XIX of the Second Amended Information, Greco's conduct relating to that charge clearly shows relevant evidence of corrupt intent on Greco's part as it relates to the use of his office to personally obtain financial benefits for himself. Greco admitted to Rex Nichols receiving $5000.00 in 1983 as, in essence, a kick-back for his arranging for Pierce County to contract with a limited partnership for the storage of Pierce County's voting machines, an arrangement over which Mr. Greco then had jurisdiction for Pierce County. Between March 1, 1984 and June 30, 1984, Greco advised one of the members of that limited partnership, James Roberts, a long-time friend of Greco's, that he was owed $5000.00 by the limited partnership for his "help" with the storage contract. Roberts conveyed this information to Nichols, who was one of the other members of that limited partnership. Greco subsequently admitted to Nichols that he had received the $5000.00 the previous year and, pursuant to his agreement with a subsequently deceased member of the limited partnership, he was owed another $5000.00 for the year 1984. Nichols had earlier reviewed the accounts of the limited partnership and could not account for $5000.00 in unexplained expenditures.

XV

Other relevant evidence of corrupt intent on Greco's part relating to the use of his office to procure personal financial gain for himself is evidenced by the payment of substantial sums of cash by Mead McDonald to Greco, between 1972 and approximately 1976, in exchange for Mr. Greco's auditor office staff doing the typing of paperwork for Mr. McDonald's licensing subagency. The reasonable conclusion from all of the evidence is that Mr. Greco converted this money to his own use.

XVI

Further evidence of misconduct relevant to show corrupt intent relates to evidence of what was charged as Count X in the Second Amended Information, i.e., the payment to Greco by the owners of the Forbes/McCallum Agency, between November 1, 1984 and December 31, 1984, of a cash payment pursuant to the same understanding and for the same reasons as the payments the McCallum's and/or Forbes had made to Greco in 1982, 1983, and 1985. While Count X was dismissed, pursuant to the defendant's motion, the dismissal was not based upon the fact that there was insufficient evidence to establish the payment had in fact been gathered pursuant to the corrupt agreement or understanding with Greco (Dena McCallum credibly testified to this). It was dismissed only because neither Forbes nor either of the McCallum's could recall which of them actually forwarded the payment to Greco in the envelope through the courier service, as was done in prior years and subsequently in 1985. This evidence shows the continuing pattern of misconduct and is relevant to establish corrupt intent as to those counts for which the defendant was found guilty.

XVII

As to the above-referenced Supplemental Finding of Fact and as to those Findings of Fact previously entered, Greco acted with a corrupt intent in reaching the agree-

ments or understandings reflected therein, in that he used his position and authority as Pierce County Auditor to unlawfully and wrongfully obtain financial benefits for himself.

XVIII

The acts set forth in the above paragraphs occurred in Pierce County, Washington.

DONE in open court this 25th day of January, 1991.

/s/ Anthony P. Wartnik
ANTHONY P. WARTNIK
Judge

Presented by

/s/ Gregory P. Canova
GREGORY P. CANOVA, WSBA #4633
Senior Assistant Attorney General
Attorney for Plaintiff

APPENDIX G

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

No. 12015-1-II
No. 14719-0-II

THE STATE OF WASHINGTON,
Respondent,

v.

RICHARD GRECO,
Appellant.

THE COURT has considered the appellant's motion for reconsideration and has determined that it should be denied. Accordingly, it is

SO ORDERED.

DATED this 20th day of October, 1993.

FOR THE COURT:

/s/ Gerry L. Alexander
Chief Judge